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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

In Equity.

No. 5, Original

OCTOBER TERM, 1938.

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UNITED STATES OF AMERICA, INTERVENOR.

Answer of the State of Colorado, Impleaded Defendant, to the Petition of Intervention of the United States of America.

BYRON G. ROGERS,
Attorney General of Colorado,
SHRADER P. HOWELL,
Assistant Attorney General,
Solicitors for the Impleaded Defendant.

GEO. J. BAILEY,
JEAN S. BREITENSTEIN,
THOS. J. WARREN,
Of Counsel.

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IN THE

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In Equity.

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THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UNITED STATES OF AMERICA, INTERVENOR.

Answer of the State of Colorado, Impleaded Defendant, to the Petition of Intervention of the United States of America.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the State of Colorado, Impleaded Defendant, by Byron G. Rogers, its Attorney General, and respectfully presents to this Honorable Court, its Answer to the Petition of Intervention of the United States of America, and saith:

I.

For answer to the first cause of action, this impleaded defendant alleges and shows as follows:

(1) This defendant admits the allegations of paragraphs numbered 1 and 2.

(2) This defendant answering paragraph third says as to the allegation that there were no, or very few and limited, private rights in the waters of the North Platte River at the times of said cessions, it is without knowledge; and admits all other allegations in said paragraph contained.

(3) This defendant answering paragraph numbered fourth avers that by the terms of the acts of Congress of July 26, 1866 (14 Stat. 253), July 9, 1870 (16 Stat. 218), March 3, 1877 (19 Stat. 377), all rights of the United States in the waters of the North Platte River and its tributaries passed to the states of Nebraska, Wyoming and Colorado, each state taking its equitable apportionment of said waters for the appropriation and use of the public of each of said states.

Further answering said fourth paragraph, this defendant avers that in 1876, the inhabitants of Colorado adopted a constitution in which is included, in Section 5 of Article XVI thereof, the provisions that,—

> "• • • the water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

And under Section 5 of the Enabling Act passed by the Congress of the United States (Act of March 3, 1875, Chapter 139, Vol. 18, Stat. at Large 474), provision was made for the admission of Colorado into the Union, in the following language:

> "And if a majority of the legal votes shall be cast for said constitution in said proposed State, the said acting Governor shall certify the same to the President of the United States, together with a copy of said constitution and ordinances, whereupon, it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original states, without any further action whatever on the part of Congress."

That the proposed constitution for Colorado was duly adopted pursuant to said Enabling Act by a majority of the legal voters, and duly certified to the President of the United States, who thereupon issued his Proclamation admitting Colorado into the Union on August 1, 1876 (U. S. Stat. at Large, Vol. 19, p. 665).

And this defendant avers that Congress by the Enabling Act, and the President of the United States by proclaiming the admission of the State into the Union, did solemnly recognize, approve, and confirm the provisions of said Section 5 of Article XVI of said constitution, asserting that ownership of the waters of the natural streams of the State, not theretofore appropriated, rests in and belongs to the People of the State. And defendant further avers that the United States by said acts surrendered and relinquished and confirmed to the State of Colorado and its people whatever rights, if any, it may have had in and to the waters of the North Platte River, within the boundaries of the State of Colorado, and it has not at any time since the adoption of said Constitution of Colorado, and the issuance of the said Proclamation of the President, had any right, title to, or ownership in and to said waters, nor has it ever hitherto so asserted; this defendant denies each and every allegation of paragraph numbered fourth not specifically admitted herein.

(4) This defendant, answering paragraph fifth, avers that the United States has, by the Acts of Congress of July 26, 1866 (14 Stat. 253), July 9, 1870 (16 Stat. 218), and March 3, 1877 (19 Stat. 377), dedicated the water in the non-navigable streams of the aforesaid ceded territories, including the basin of the North Platte River, to the public for irrigation and other beneficial purposes; avers that by such dedication, the United States abdicated and ceded away its rights in such waters of non-navigable streams, including its rights in the waters of the North Platte River; avers that upon such dedication, such waters, including the waters of the North Platte River, passed to and became the property of the respective states in which such non-navigable streams flowed, for the benefit and use of the public of such states; that from time to time private persons have, by appropriation made in compliance with the law of one or the other of the litigant states, acquired from such state, rights to use certain quantities of the

waters of the North Platte River; that the United States by compliance with the laws of Wyoming and Nebraska, has initiated appropriation rights to the waters of the North Platte River for federal reclamation projects; that such appropriation rights, initiated by the United States, under the terms and provisions of the Act of June 17, 1902 (32 Stat. 388, 390), were and are appurtenant to the land upon which the water was and is used, and such appropriation rights are the property of the respective land owners, and are not the property of the United States; that if there are any waters in said North Platte River which have not been appropriated, rights therein are open to acquisition in accordance with the laws of the respective states; this defendant denies each and every allegation of paragraph fifth not specifically admitted herein.

(5) With reference to paragraph sixth, this defendant admits that the United States by authority of the Reclamation Act of June 17, 1902 (32 Stat. 388), acting through the Secretary of the Interior, constructed a reclamation project on the North Platte River, known as the North Platte Project; admits that the irrigation works of said project include the Pathfinder Reservoir in Wyoming, with a storage capacity of 1,070,000 acre feet; the Guernsey Reservoir in Wyoming, with a storage capacity of 70,000 acre feet, a diversion dam at Whalen, Wyoming, an extensive system of main and lateral canals, including interstate canals, two inland reservoirs in Nebraska, known as Lake Alice and Lake Minatare, with a combined storage capacity of about 77,000 acre feet; as to the acreage of land embraced in the said Project in each of the states of Nebraska or Wyoming, and the amount expended in construction, and the amount which has not yet been repaid, and each and every allegation not herein specifically admitted, this defendant has no knowledge; further answering, this defendant avers that the rights in and to the water used in said project are not the property of the United States.

(6) This defendant answering paragraph seventh denies that the United States reserved or withdrew from further appropriation for the purposes of the North Platte Project certain quantities of the unappropriated waters of the North Platte River; and avers that for the purposes of the North Platte Project, the United States, pursuant to the mandatory provisions of Section 8 of the Reclamation Act of June 17,

1902 (32 Stat. 388), initiated appropriation rights to a portion of the waters of the North Platte River in conformity with the laws of the state where the waters were to be diverted; as to whether the United States, in the case of waters to be diverted and stored in Wyoming for use in Nebraska, proceeded in conformity with laws of Wyoming, and as far as possible in conformity with the laws of Nebraska, this defendant is without knowledge; alleges that the aforesaid appropriation rights are not the property of the United States but are the property of the settlers on and the owners of the land in said project on which such waters are applied to beneficial use; denies each and every allegation of paragraph seventh not specifically admitted herein.

(7) This defendant answering paragraph Eighth, denies that the United States has reserved any of the waters of the North Platte River for the North Platte Project; avers that whatever rights have been initiated by the United States were initiated as set forth in paragraph Sixth of this Answer; admits that project waters are either applied directly to irrigation through the main and lateral canals of the Project or are stored in the project's reservoirs for withdrawal as needed; as to the acreage of lands included in the Project, and as to the acreage of lands which were public lands when the Project was commenced and were thereafter disposed of to settlers as provided by the Reclamation Act, and as to the acreage of lands which were privately owned when the project was commenced, this defendant has no knowledge; this defendant avers that whatever rights the settlers and landowners acquired were so acquired by compliance with the laws of the states wherein the lands are situated and by the beneficial application of said waters to the respective lands, which said waters then became appurtenant to said lands, and are not the property of the United States; admits that the settlers agreed to pay and are paying certain charges; and avers that those charges are for the storing and carrying of water, and for the ultimate repayment to the United States of the construction costs. Denies that the United States is lawfully furnishing water to these settlers and landowners, except so far as the same is done in accordance with the terms of the Reclamation Act and in conformity with State law. As to whether the charges to settlers and landowners have not yet been paid in full, and as to whether in many cases final payments are not

due for many years, this defendant has no knowledge; denies each and every allegation in said paragraph contained not specifically admitted herein.

(8) Answering paragraph ninth, this defendant denies that the United States has reserved any of the waters of the North Platte River; avers that waters diverted from the North Platte River by the Secretary of the Interior under appropriations initiated by him in conformity with Section 8 of the Reclamation Act and applicable state law, and perfected by the application of such waters to beneficial use by such settlers and land owners for the irrigation of lands within the North Platte Project, are also used for hydro-electric purposes at Lingle and Guernsey, Wyoming; avers that the use of such waters for hydro-electric purposes is incidental to the use for irrigation and is a permissive use with the sanction of the settlers and land owners in said Project in whom the title of said waters rests; admits that the waters so used are withdrawn from the direct flow of the North Platte River and its tributary, the Laramie River, and from storage in the Guernsey Reservoir.

In this connection, however, this defendant avers that pursuant to a decree of this court entered in the case of Wyoming versus Colorado on June 5, 1922, and October 9, 1922, and which are reported respectively in the 259 U. S., p. 496; 260 U. S., p. 1, it was decreed that all the waters of the Laramie River were and are fully and completely divided and apportioned between the State of Wyoming and this impleaded defendant, the State of Colorado; it is further averred that the said petitioner herein is without power or authority at law to make use of any waters from the said Laramie River which may in any manner reduce, limit, or in any way interfere with the said apportionment of the waters of the said Laramie River made and allocated to the State of Colorado by the terms of said decree; denies each and every allegation in said paragraph contained not herein specifically admitted.

(9) Answering paragraph numbered tenth, this defendant denies that any of the waters of the North Platte River are or ever have been reserved by the United States; admits that under the provisions of the Act of February 21, 1911 (36 Stat. 925), the United States has entered into contracts

with irrigation districts for storing and carrying water; admits that the irrigation districts have agreed to pay the United States stipulated amounts for storing and carrying such water; as to the amount of such storing or carrying charges now remaining unpaid and as to the amount of water delivered under such contracts, this defendant is without knowledge; avers that all water lawfully delivered to said irrigation districts under the aforesaid contracts is the property of the individuals using said water under appropriations made in conformity with the laws of Nebraska and Wyoming and is not the property of the United States; denies that any waters stored or carried under said contracts are project waters; avers that the United States has no rights whatsoever in any seepage or return flow waters from the lands of the North Platte Project; avers that the impounding and storage in the Pathfinder Reservoir of waters theretofore appropriated by individuals for direct use at points of diversion hundreds of miles lower on the river are subject to and controlled by the constitution and laws of the litigant states; denies each and every allegation of paragraph tenth not specifically admitted herein.

(10) This defendant answering paragraph eleventh denies that the United States reserved any water of the North Platte River for the North Platte Project; with respect to any purported contract, or the terms thereof, which may have been entered into by the Secretary of the Interior with certain municipalities and industrial concerns in the vicinity of the North Platte Project, and as to whether some of said waters are delivered to certain municipalities and industrial concerns in the vicinity of said project, and as to whether such alleged contracts are perpetual or temporary, this defendant is without knowledge. Further answering said allegations in said paragraph contained, this defendant avers that neither the United States, nor the Secretary of the Interior, has any power or authority to enter into such alleged contracts providing for the sale of the waters of the North Platte River.

(11) This defendant answering paragraph twelfth admits that the United States, through the Secretary of the Interior and under the authority of the Reclamation Act, has under construction a reclamation project in the North Platte

Basin, known as the Kendrick Project, and that it includes the Seminoe Dam and Reservoir, with a storage capacity of about 909,000 acre feet, Alcova Dam and Reservoir, with a storage capacity of about 165,000 acre feet, and main and lateral canals; admits that said project includes a hydro-electric development now under construction. As to whether the total cost of irrigation works of said project will be approximately $20,000,000, and whether the United States has already expended $9,000,000, and whether the hydro-electric development will cost $5,000,000, and whether said project embraces about 66,000 acres of land all within the State of Wyoming, this defendant is without knowledge; denies each and every allegation of paragraph twelve not specifically admitted herein.

Answering further, this defendant denies that the United States expect to recover all of its expenditures upon said project by the disposal of water and electric energy; but on the contrary this defendant avers that the United States has no right, power or authority to sell or dispose of the waters of the North Platte River; avers that the waters to be appropriated for use on the Kendrick Project will be appurtenant to the lands on which used and will be the property of the land owners who shall have applied them to beneficial use.

Further answering, this defendant avers that any rights initiated for the benefit of the said Kendrick Project are co-equal with and not superior to the rights of the State of Colorado to an equitable proportion of the waters of the North Platte River, and its tributaries, which were unappropriated at the time of the initiation of said Kendrick Project, as is more fully set forth in paragraph seventeenth of this defendant's Cross Bill in the original cause herein;

And in connection with the construction of the said Kendrick Project, this defendant further shows that the Act of the Congress, which was approved August 9, 1937 (50 Stat. at Large, Chap. 570, page 595) contains the following language with respect to the operation of said Project: "Provided, that in recognition of the respective rights of both the State of Colorado and Wyoming to the amicable use of the waters of the North Platte River, neither the construction, maintenance, nor operation of said project shall ever interfere with the present vested rights or the fullest use here-

after for all beneficial purposes of the waters of said stream or any of its tributaries within the drainage basin thereof in Jackson County in the State of Colorado, and the Secretary of the Interior is hereby authorized and directed to reserve the power by contract to enforce such provisions at all times. * * *."

(12) This defendant answering the allegations contained in paragraph thirteenth denies that the United States reserved or withdrew from further appropriation certain or any quantities of the theretofore unappropriated water of the North Platte River for the purposes of the Kendrick Project; but, on the contrary, this defendant avers that the United States, acting through the Secretary of the Interior, pursuant to the mandatory provisions of Section 8 of the Reclamation Act did attempt to initiate appropriation rights to the waters of the North Platte River in conformity with the laws of Wyoming, but as to whether such procedure was in full conformity with the laws of Wyoming, this defendant has no knowledge; denies each and every allegation of paragraph thirteenth not specifically admitted herein.

(13) This defendant answering paragraph fourteenth denies that certain quantities of the waters of the North Platte River were at any time reserved by the United States; avers that all the waters which will be used for the irrigation of lands included in the Kendrick Project will be appropriated by and will be the property of settlers and land owners who shall have applied such waters to a beneficial use; denies that the United States has any power or authority to "regularize" or augment the flow of the North Platte River; denies each and every allegation in said paragraph contained not specifically admitted herein.

II.

And for answer to the second cause of action, this impleaded defendant alleges and shows as follows:

(1) In answer to the first paragraph of the second cause of action, this defendant incorporates herein by reference as fully and with the same effect as though re-alleged here at length, all the allegations as contained in the fifth paragraph of its answer to the first cause of action.

(2) This defendant in answer to the second paragraph of said cause of action, avers that for the purposes of the North Platte Project, the United States, pursuant to the mandatory provisions of Section 8 of the Reclamation Act, initiated appropriation rights to a portion of the waters of the North Platte River in conformity with the laws of the state where the waters were to be diverted; and further avers that the aforesaid appropriation rights are not the property of the United States but are the property of the settlers on and the owners of the land in said project on which such water is applied to a beneficial use. As to whether the United States complied with the law of Wyoming in the case of water diverted or stored in Wyoming for use in Nebraska, and complied with the law of Nebraska as far as possible, this defendant is without knowledge, and denies each and every allegation in paragraph two not specifically admitted herein.

(3) This defendant answering paragraph third avers that whatever rights have been initiated by the United States were initiated as set forth in paragraph Sixth of its answer to the first cause of action; admits that project waters are either applied directly to irrigation through the main and lateral canals of the project or are stored in project's reservoirs for withdrawal as needed; as to the acreage of lands included in the Project, and as to the acreage of lands which were public lands when the Project was commenced and were thereafter disposed of to settlers as provided by the Reclamation Act, and as to the acreage of lands which were privately owned when the project was commenced, this defendant has no knowledge; this defendant avers that whatever rights the settlers and landowners acquired were so acquired by compliance with the laws of the states wherein the lands are situated and by the beneficial application of said waters to their respective lands, which then became appurtenant to said lands, and are not the property of the United States; admits that the settlers agreed to pay and are paying certain charges, and avers that those charges are for the storing and carrying of water, and for the ultimate repayment to the United States of the construction costs. Denies that the United States is lawfully furnishing water to these settlers and landowners, except so far as the same is done in accordance with the terms of the Reclamation Act and in conformity with State law. As to whether the charges to settlers and land-owners have not yet

been paid in full, and as to whether in many cases final payments are not due for many years, this defendant has no knowledge; denies each and every allegation in said paragraph contained not specifically admitted herein.

(4) Answering paragraph fourth, this defendant avers that waters diverted from the North Platte River by the Secretary of the Interior under appropriations initiated by him in conformity with Section 8 of the Reclamation Act and applicable state law, and perfected by the application of such waters to beneficial use by the settlers and land owners on land within the North Platte Project, are also used for hydro-electric developments at Lingle and Guernsey, Wyoming; avers that the use of such waters for hydro-electric purposes is incidental to the use of the water for irrigation purposes and is a permissive use with the sanction of the settlers and land owners in said project in whom the title of said water rests; admits that the waters so used are withdrawn from the direct flow of the North Platte River and its tributary, the Laramie River, and from storage in the Guernsey Reservoir; denies each and every allegation in said paragraph not herein specifically admitted.

In further answer to paragraph fourth of said cause of action, this defendant incorporates herein by reference as fully and with the same effect as though re-alleged here at length all of that portion of the allegations and averments with respect to the decree of this Court in the case of Wyoming versus Colorado, and relating to the apportionment of the water of the Laramie River, as contained in paragraph eight of defendant's answer to the first cause of action.

(5) This defendant answering paragraph numbered fifth, admits that under the provisions of the Act of February 21, 1911 (36 Stat. 925), the United States has entered into contracts with irrigation districts for storing and carrying water; admits that the irrigation districts have agreed to pay the United States stipulated amounts for storing and carrying such water; as to the amount of such storing or carrying charges now remaining unpaid, and as to the amount of water delivered under such contracts, this defendant is without knowledge; avers that all water lawfully delivered to said irrigation districts under the aforesaid contracts is the property of the individuals using said water under appropriations

made in conformity with the laws of Nebraska and Wyoming, and is not the property of the United States; denies that any waters stored or carried under said contracts are project waters; avers that the United States has no rights whatsoever in any seepage or return flow waters from the lands of the North Platte Project; avers that the impounding and storage in the Pathfinder Reservoir of waters theretofore appropriated by individuals for direct use at points of diversion hundreds of miles lower on the river are subject to and controlled by the constitution and laws of the litigant states; denies each and every allegation of paragraph fifth not specifically admitted herein.

(6) This defendant answering paragraph sixth, says with respect to any purported contract, or the terms thereof, which may have been entered into by the Secretary of the Interior with certain municipalities and industrial concerns in the vicinity of the North Platte Project, and as to whether some of said waters are delivered to certain municipalities and industrial concerns in the vicinity of said project, and as to whether such alleged contracts are perpetual or temporary, this defendant is without knowledge. Further answering said allegations in said paragraph contained, this defendant avers that neither the United States, nor the Secretary of the Interior, has any power or authority to enter into such alleged contracts providing for the sale of the waters of the North Platte River.

(7) Answering the seventh paragraph of said second cause of action, this defendant incorporates herein by reference as fully and with the same effect as though re-alleged here at length, all the admissions, denials, and averments as contained in eleventh paragraph of its answer to the first cause of action.

(8) This defendant, answering paragraph eighth, avers that for the purposes of the Kendrick Project, the Secretary of the Interior, pursuant to the mandatory provisions of Section 8 of the Reclamation Act, has attempted to initiate appropriation rights to the waters of the North Platte River in conformity with the laws of Wyoming, but as to whether or not such procedure was in full conformity with the laws of Wyoming, or whether the Secretary of the Interior will hereafter perfect such alleged rights by further compliance with

the applicable state law, this defendant has no knowledge; denies each and every allegation of paragraph eighth not specifically admitted herein.

(9) Answering paragraph ninth of said second cause of action, this defendant avers that all water which will be used for the irrigation of lands included in the Kendrick Project will be appropriated by and will be the property of settlers and landowners who shall have applied such waters to a beneficial use; denies that the United States has any power or authority to "regularize" or augment the flow of the North Platte River; denies each and every allegation of said paragraph not specifically admitted herein.

III.

For a second and further defense to both first and second causes of action of the Petition of Intervention of the United States of America, this defendant says:

(1) This defendant refers to and by this reference incorporates herein paragraphs numbered one to thirteen of its first defense to the first cause of action, and paragraphs numbered one to nine of the first defense to its second cause of action.

(2) That the rights of the United States, if any, in and to the waters of the North Platte River and of its tributaries are derived through or under appropriations made in conformity with the laws of Nebraska, Wyoming and Colorado, and the priorities of such appropriations are determined by the laws of the state in which the appropriation is made.

(3) This defendant avers that many appropriations of water in the North Platte River have been made by private individuals, corporations and associations in conformity with the laws of the respective states of Nebraska, Wyoming or Colorado. That none of such appropriators is a party to this proceeding.

(4) This defendant avers that by reason of the foregoing, this Court is without jurisdiction in the proceeding to determine the appropriation rights, if any, of the United States to the waters of the North Platte River.

WHEREFORE, the State of Colorado, impleaded defendant herein, prays:

First: As prayed in its original answer and cross bill;

Second: That the Petition of Intervention of the United States of America, be dismissed and held for naught;

Third: That the State of Colorado, impleaded defendant herein, have such further, other and different relief as to the Court may seem just and equitable.

THE STATE OF COLORADO,
Impleaded Defendant.
By BYRON G. ROGERS,
Attorney General of the State of Colorado.
SHRADER P. HOWELL,
Assistant Attorney General.
Solicitors for the Impleaded Defendant.

GEO. J. BAILEY,
JEAN S. BREITENSTEIN,
THOS. J. WARREN,
Of Counsel.

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

BYRON G. ROGERS, being first duly sworn, upon his oath deposes and says:

That he is the duly elected, qualified and acting Attorney General of the State of Colorado; that as such Attorney General, he is the duly authorized solicitor and representative of the impleaded defendant named in the foregoing answer; that he has read the said answer, knows the contents thereof and that the facts therein set forth are true, except those averred upon information and belief, and that as to those facts, affiant verily believes the same to be true.

BYRON G. ROGERS.

Subscribed and sworn to before me this 26th day of August, A. D. 1938.

My commission expires August 8, 1942.

ELIZABETH D. PATTEN,
Notary Public.

(Seal)